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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH ONCALE
Petitioner,
v.
SUNDOWNER OFFSHORE SERVICES, INC.
JOHN LYONS; DANNY PIPPEN; AND BRANDON JOHNSON,
Respondents

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF AMICUS CURIAE TEXAS ASSOCIATION OF BUSINESS & CHAMBERS OF COMMERCE IN SUPPORT OF RESPONDENT

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I.

STATEMENT OF INTEREST

The Texas Association of Business & Chambers of Commerce ("TABCC") is a non-profit corporation that represents employers throughout the State of Texas. It is the largest employer representative in the State of Texas, with a membership that includes more than 6,000 business and 10,000 individual members, and 300 chambers of commerce. TABCC is interested in the outcome in this case because the Petitioner is asking the Court to adopt a position that would have a grave and unfair effect on employers.

II.

SUMMARY OF THE ARGUMENT

To adopt the position of Petitioner would be to make employers subject to and hence potentially liable under a law about which they received no advanced notice. It would unfairly penalize employers who have relied upon the plain and clear meaning of Title VII since its enactment. It would also require employers to become judges of the sexual orientation and practices of their employees. Thus, both principles of fairness and public policy considerations militate against recognition of same sex-sexual harassment claims under Title VII.

III.

ARGUMENT

A. **Having notice of the various laws affecting employers and the reasonable interpretation of such laws is of fundamental importance to all employers**. In fact, fundamental principles of fairness mandate that employers be given prior notice of laws that affect them or subject them to potential liability. Indeed, as this Court recently stated in ruling that Section 102 of the Civil

Rights Act of 1991 does not apply to Title VII cases pending on appeal when the statute was enacted:

> ... Neither in *Bradley [v. Richmond*, 416 U.S. 711 (1974)] itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment. [Citations and footnote omitted.]
>
> It will frequently be true, as petitioner and amici forcefully argue here, that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity. ...
>
> The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation.

Landgraf v. USI Film Products, 114 S.Ct.1483, 1507-08 (1994).

While it is recognized that the *Landgraf* decision applies specifically and expressly to the retroactivity of statutes, it is nonetheless instructive, if not directly applicable in this case. Judicial recognition of same-sex sexual harassment claims as covered by Title VII would be tantamount to passage of a new statute imposing additional potential liability on employers. Congress clearly did not intend to provide protection to employees based on their sexual orientation when it passed Title VII in 1964. *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69 (8th Cir. 1989)("Title VII does not prohibit discrimination against homosexuals."); *Ulane v. eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984)(transsexuals are not

protected under Title VII), *cert. denied*, 471 U.S. 1017 (1985); *DeSantis v. Pacific Tel. And Tel.*, 608 F.2d 327 (9th Cir. 1979)(homosexuals are not protected under Title VII); *Dillon v. Frank*, 58 F.E.P. Cases 90 (E.D. Mich. 1990), *aff'd*, 952 f.2d 4031 (6th Cir. 1992)(taunts and threats to the plaintiff which are based on the belief that the plaintiff is homosexual are not actionable under Title VII); *Polly v. Houston Lighting and Power*, 825 F.Supp. 135, 137 (S.D. Tex. 1993)("It is well established, absent any change in the law by Congress, that Title VII does not protect homosexuals from harassment and discrimination in the workplace, since such treatment arises from their affectional preference rather than from their sex."); *Sarff v. Continental Express*, 824 F.Supp. 1076, 1081 (S.D. Tex. 1995)("an employer can clearly fire an employee for being gay"). In fact, efforts to provide federal statutory anti-discrimination protection based on sexual orientation have been rejected by Congress on numerous occasions, as recently as 1996. *Romer v. Evans*, 116 S.Ct. 1620, 1637 (1996) (Scalia, J., dissenting).

Moreover, as the Court in *Landgraf* noted, "fairness concerns" are present in any case where damages may be assessed based on events that occurred prior to a law's enactment. 114 S.Ct. at 1560, n.35. The *Landgraf* Court stated: "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.*

Subjecting Respondent, and indeed any employer, to liability for alleged same-sex sexual harassment would violate fundamental principles of fairness and notice. Based on long-standing and well-established law, particulary in the Fifth Circuit where Respondent operates and from which this case originates, employers had no reason to suspect that they could be held liable for such alleged conduct under Title VII. To subject employers to such liability without notice would be unjust.

B. **Public policy considerations also support this Court's refusal to recognize same-sex sexual harassment claims under Title VII**. As the Court of Appeals for the Fourth Circuit recently noted in *McWilliams v. Fairfax County Bd. Of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert denied,* 117 S.Ct. 72 (1996) when refusing to expand Title VII to reach same-sex sexual harassment cases, such an extension of Title VII would result in litigants (both employees and employers) and the courts attempting to determine a person's sexual orientation. In *McWilliams*, the Fourth Circuit stated the following:

> We believe that were Title VII to be so interpreted [to reach claims "where homosexuality (either in fact or as merely suggested by conduct) is involved"], the fact of homosexuality (to include bisexuality) should be considered an essential element of the claim, to be alleged and proved. The dissent expresses concern, because of proof (and privacy?) problems, about requiring such allegation and proof, but we believe it critical and eminently fair to require it if homosexuality is to be the critical fact making same-sex harassment claims cognizable under Title VII. The (ordinarily different) sexes of the relevant actors always has been an essential element of either form of Title VII sexual harassment claims. If such claims were to reach past different-sex to same-sex situations where homosexuality of one or the other or both of the actors is involved, that added fact would seem equally essential to the statement and proof of such a claim. If not required to be alleged, a defendant could be blindsided by proof of conduct merely suggestive of homosexuality between persons of the same sex who actually are heterosexuals. If not required to be proved, the sexual harassment claim would effectively have been extended to cover any conduct between even same-sex heterosexual workers that included sufficient homosexual innuendo.

Id. at 72 F.3d 1191, n.5. Indeed, even the dissent in *McWilliams* acknowledged the problems which would result from recognizing same sex sexual harassment claims by noting that "evidence of sexual orientation could be relevant to either side's case." *Id.* at 1198.

Moreover, by recognizing same-sex sexual harassment claims, courts may ultimately be encouraging all alleged harassers to claim that they are bi-sexual. Because the plain language of Title VII requires a plaintiff to establish that "but for" his or her sex (i.e., gender), the alleged harassment would not have occurred, courts as far back as 1977 have found that where an alleged harasser is bi-sexual, the harasser's sexual advances do not constitute discrimination under Title VII. *See Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). The *Barnes* court reasoned that the but-for test could not be satisfied where the alleged harasser is bi-sexual because the harassment would have occurred regardless of the "victim's" gender. *Id.* The reasoning of the *Barnes* court was also noted with approval in *Bundy v. Jackson*, 641 F. 2d 934, 942 n. 7 (D.C. Cir. 1977)("Only by a *reductio ad absurdum* could we imagine a case of harassment that is not sex discrimination -- where a bisexual supervisor harasses men and women alike.") and *Henson v. City of Dundee*, 682 F. 2d 897, 904 (11th Cir 1982)(In the case of a bisexual harasser, "the sexual harassment would not be based upon sex because men and women are accorded like treatment. Although the plaintiff might have a remedy under state law in such a situation, the plaintiff would have no remedy under Title VII."). Indeed, even courts that have allowed plaintiffs to proceed under Title VII based on claims of homosexual sexual harassment have recognized that they would not have done so if the alleged harasser was bisexual. *See. e.g., EEOC v. Walden Books*, 885 F.Supp. 1100, 1103-04 (M.D. Tenn. 1995)("When a homosexual supervisor is making offensive sexual advances to a subordinate of the same sex, **and not doing so to employees of the opposite sex**, it absolutely is a situation where but for the subordinates sex, he would not be subjected to that treatment."); *Wright v. Youth Methodist*

Service, 511 F.Supp. 307 (N.D. Ill. 1981)(applying the but for test and concluding that terminating an employee for refusing homosexual advances violated Title VII because it involved "an alleged demand of a male employee **that would not be directed to a female**); *Parrish v. Washington Nat'l Ins. Co.*, No. 89.C.4515, 1990 WL 16561 1, *7 (N.D. Ill. Oct. 16, 1990)(same).

These proof and privacy problems are inherent in any judicial expansion of Title VII beyond the scope of its statutory language or legislative history to permit same-sex sexual harassment claims. Unless and until new, affirmative legislative action mandates otherwise, the courts should refrain from expanding Title VII to permit such claims. Indeed, to do otherwise would unfairly subject employers to liability of which they reasonably could not have been aware, and mandate that employers and the courts attempt to judge and determine a litigant's sexual orientation and/or practices. Employers have a difficult enough time discerning whether conduct is prohibited under Title VII based on the primarily objective factors contained in the statute (i.e., race, color, national origin). To mandate that employer's must now determine a person's sexual orientation in order to comply with the law would be unduly burdensome and far beyond the intent of Congress in 1964.

IV.

CONCLUSION

Petitioner's request that this Court find same-sex sexual harassment claims actionable and/or cognizable under Title VII of the Civil Rights Act of 1964, as amended, should be denied. The decision of the Fifth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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